

The Facilitative Function of International Humanitarian Law at the Intersection of Law and Morality

Eliav Lieblich

Adil Haque presents an ambitious attempt to reconcile the laws of war and “deep morality,” by constructing international humanitarian law (IHL) as a (mainly) prohibitive system, the constitutive aim of which is non-consequentialist: to provide combatants with rules that if followed would allow them to better conform to their moral obligations. This paper seeks to develop, and problematize, these themes, in order to propose a wider reflection on what IHL *does*. Utilizing insights from legal realism, my basic argument is that when determining whether law authorizes or prohibits, it is not sufficient to analyze pure legal concepts, but rather, we have to adopt a broader point of view, which asks how law functions in society. This analysis reveals that law can be *facilitative* of action, even if we interpret it as prohibitive. This realization, in turn, calls for caution: in reading law as prohibitive, when it is in fact facilitative, we might be complicit in legitimating war in dubious circumstances. The question then returns to just war theorists: even if IHL is formally prohibitive, yet facilitative in practice, can we really say that we have mended the gap between the laws of war and “deep morality”? Relatedly, this paper questions whether law can achieve its aim to provide moral guidance in a world where some soldiers are “bad” (ie not really interested in morality); and whether reliance on law can in practice relieve the burden of independent discretion, and thus truly help “good” soldiers to better conform to their moral obligations. It furthermore shows that rule-consequentialism retains its central importance in justifying some key aspects of IHL. We should perhaps not give up on asserting its power within law.

Deontological Distinction

Kim Ferzan

Haque imports deontology into his principle of distinction in compelling ways. However, this paper will question, among other things, his use of a “reasonable belief” standard; his weakening of some, but not other, deontological constraints above a certain threshold; and the weight he places on the doing/allowing distinction. Ultimately, I offer some refinements to what is otherwise an admirable and rigorous analysis of distinction.

“Joint Action and Responsibility in ‘Law and Morality at War’”

Saba Bazargan

In his book, “Law and Morality at War”, Adil Haque argues that there is a sharp moral line between unjust combatants directly participating in an unjust war, and the vast majority of civilians of the state perpetrating that war. The members of the former group are not liable to be killed, whereas members of the latter group are. Haque does this balancing-act largely by invoking the twin concepts of *direct participation* and *joint action*. I will focus on the latter by arguing that joint action – as Haque understands it – does not draw a sharp moral line in the place he wants it to. I will argue that instead Haque is committed to the following view: if combatants who provide administrative, logistical, or other general service and support count as joint enablers, then so do civilians who buy war bonds, write supportive editorials, work in the defense industry, and so on. The concept of joint action is not alone enough to separate these two kinds of contributors. I will also argue that Haque’s position on voluntary shields in Chapter 9 puts pressure on the distinction he makes between jointly enabling and jointly perpetrating. If voluntary shields in his ‘Shield Attack’ example jointly perpetrate a threat together with unjust combatants engaged in hostilities, then it’s unclear why unjust combatants who ‘merely’ provide administrative, logistical, or other general service and support do not *also* count as jointly perpetrating a threat with those engaged in hostilities.

Law and Morality at Peace? On Politics and the Ethics of Armed Conflict

Christopher Finlay

If Adil Ahmad Haque's book refers to a war between law and morality, then it is a war that the law wins decisively. Moral philosophy helps find the best interpretation of existing law, on Haque's account, and justifies the law's claim to have 'legitimate authority'. But Haque maintains that ultimately the law is generally all we need to distinguish right from wrong actions in armed conflict. Whether we seek guidance as direct participants hoping to *do* the right thing or as observers hoping to recognize it when we see it, following the LOAC / IHL directly (and International Law more generally) gives the best chance of success. We should disregard other possible normative sources as direct guides. Haque thus contributes in a novel and sophisticated way to a view defended on different grounds by Michael Walzer and Jeremy Waldron (among others) according to which, in fact, morality and war are generally at peace during war. My paper will suggest that this view is overly optimistic. For one thing, International Law cannot explain fully the permissions claimed by soldiers, whether just or unjust. This is perhaps most dramatically the case for non-state belligerents, but it also has a bearing on the rights of regular soldiers fighting for states. Moreover, it is likely that conflicts of principle will occur in which neither the law nor a direct appeal to morality can guide participants authoritatively, particularly when 'deadly serious conventions' (as Waldron calls non-combatant immunity) clash with 'deadly serious causes'. These problems suggest that the ethics of armed conflict has a political dimension that isn't easily reducible either to law or morality.